

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, an auto mechanic for respondent, regularly lifted weights in his job of up to 75 pounds. Claimant's job activities required substantial lifting, bending and twisting. On approximately May 12, 2003, claimant was working in respondent's repair facility when he felt a pull in his back while lifting oversized tires and placing them in the bed of a truck. Claimant testified he notified his supervisor, Donald Sweeney, that he had injured his back within two or three days of the accident. Mr. Sweeney, who testified in this matter at preliminary hearing, did not deny notice, but acknowledged that he did not remember the specific notice. However, when questioned by claimant's attorney, Mr. Sweeney was unable to say specifically that he had not been provided notice of the accident at the time claimant alleged.

Claimant first sought medical care with Timothy S. Wolff, D.O., in Wichita, Kansas, on June 24, 2003. At that time, he advised Dr. Wolff that he had low back pain for approximately one month, with the pain worsening over the previous week. The note contained in the doctor's records indicated claimant was unable to work due to the pain and that he did a lot of heavy lifting. When Dr. Wolff saw claimant on June 27, 2003, three days later, claimant advised that he was feeling much better and that the discomfort, while still present, was at least manageable. At that time, claimant was on muscle relaxants and pain pills, and had been off work for several days. There was some indication in Dr. Wolff's June 27 report that claimant was being asked to transfer from working as a mechanic to working at the front desk, which claimant objected to as he had invested approximately \$40,000 to \$50,000 in tools and other equipment and did not desire to move to the front desk at that time.

Claimant continued working for respondent as a mechanic until January 30, 2004. During this time, he had several visits with Dr. Wolff, all involving recurrent back pain.

Claimant testified that his back pain became more severe with time, although there were periods when claimant was off work when his back appeared to improve. Claimant testified that he missed substantial amounts of work because of his back problems and this was causing concern with his employer.

Claimant wore an elastic back brace, which was visible to respondent, with Mr. Sweeney acknowledging that between May of 2003 and March of 2004, claimant's back condition appeared to worsen. He further acknowledged that the worsening of claimant's back was one of the decisions involved in moving claimant out of the service technician job and to the service desk.

On January 30, 2004, claimant approached Mr. Sweeney and obtained an employer's report of accident, which was completed on that date.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> Claimant testified to a specific traumatic accident on May 12, 2003, and a worsening of his condition over a period of several months, as he worked lifting heavy weights on a regular basis as an auto mechanic. Claimant testified that his condition would improve at times, but that the heavy lifting on the job did make it worse. This testimony is supported by claimant's supervisor, Mr. Sweeney. The fact that claimant was wearing a back brace at work further supports claimant's contention that he was having ongoing difficulties.

Claimant has alleged a traumatic injury, followed by a series of accidents through at least January 30, 2004. The Board finds, for purposes of preliminary hearing, this record supports claimant's contentions. The Board, therefore, finds that the notice and written claim provided by claimant, at the very latest, on January 30, 2004, would be timely pursuant to K.S.A. 44-520 and K.S.A. 44-520a.

The Board, therefore, finds that the preliminary hearing Order of Judge Barnes should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 22, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2005.

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BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).